TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 212.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 9, 1903.

(18,828.)

(18,828.)

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No. 600.

JOHN LOWE, APPELLANT,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1903.

1 I.—*Petition and Exhibits.—Filed September* 12, 1901.

In the Court of Claims of the United States.

JOHN LOWE, Claimant,
vs.
THE UNITED STATES. } No. 22626.

The claimant, John Lowe, respectfully shows to the court as follows:

I.

That he is a citizen of the United States, a resident of the town of Noroton, Connecticut, and is an officer, of the grade of rear-admiral, on the retired list of the United States Navy, as hereinafter set forth.

II.

That by an act of the Congress of the United States, approved March 3, 1899, (30 Stats. 1004,) entitled, "An act, to reorganize and "increase the efficiency of the personnel of the Navy and Marine "Corps of the United States," it was, *inter alia*, in section 7 thereof, provided,

"That the *active* list of the line of the navy, as constituted by section one of this act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants, (junior grade) and ensigns; Provided, that each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the army."

2 Section 11 thereof, provided—

"That any officer of the navy with a creditable record, who served during the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

Section 13 thereof, provided—

"That, * * * commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army."

III.

That, thereafter, claimant having reached the age for involuntary retirement from the active list of the navy, he was placed upon the retired list thereof, by direction of the honorable Secretary of the Navy, and advised that from and after December 11, 1900, he should regard himself as transferred to the retired list of officers of the United

States Navy, in accordance with the provisions of section 1444, Revised Statutes of the United States, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.* rear-admiral, in accordance with the provisions of section 11, of the naval personnel act, *supra;* a true and correct copy of the order so placing claimant upon the retired list, as aforesaid, is hereto attached, made part hereof, and marked Exhibit "A."

IV.

That, at the date of the passage of the act aforesaid, and until his retirement, as aforesaid, claimant held the rank of captain in the said navy; that he had a creditable record, and had served during the Civil War; that he received compensation as such captain
3 at the rate of $4,500.00 per annum; and, upon his said retirement, became entitled, by virtue of said provisions of law, to the rank and three-fourths the sea pay of the next higher grade, *i. e.* that of rear-admiral, to wit, the sum of $5,625.00 per annum.

V.

That notwithstanding the rights so secured to claimant by virtue of the provisions of law aforesaid, defendant has refused and still refuses to pay him the compensation so fixed, as aforesaid, namely, three-fourths the sea pay of the grade of rear-admiral; and insists that he is only entitled to receive compensation at the rate of three-fourths the sea pay of the nine lower numbers of that grade; as will appear from copies of the decisions of the acting Auditor for the Navy Department and Comptroller of the Treasury, hereto attached, made part hereof, and marked Exhibits "B" and "C."

VI.

Claimant further shows that the classification of rear-admirals contained in the personnel act aforesaid, namely eighteen, the upper nine numbers to receive the pay and allowances of a major general in the army, and the lower nine numbers to receive the pay and allowances of a brigadier general in the army, was in respect only of the pay of rear-admirals on the active list of the navy; and that no such classification was intended or provided in said act in respect of officers upon the retired list of the grade of rear-admiral.

VII.

4 Claimant further shows that the difference in pay, so withheld from him without right as aforesaid, amounts to the sum of $1,500.00 per annum, and at this time, to the sum of $1,125.00; that, as above shown, he is justly entitled to recover said sum from the defendant, after allowing all just credits and set-offs; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him; and that he has at all times borne true allegiance to the United States.

Wherefore, claimant prays that judgment may be entered herein in his favor against the defendant in the sum of $1,125.00.

JOHN LOWE, *Claimant.*

CHARLES L. FRAILEY,
Attorney for Claimant.

STATE OF CONNECTICUT, } ss:
County of Fairfeld, }

Before me, the undersigned, personally appeared John Lowe, who, being by me first duly sworn, on oath, says, that the matters and things set forth in the foregoing petition by him subscribed are true, as he verily believes.

JOHN LOWE.

Subscribed and sworn to before me this 10 day of Sept. A. D. 1901.

JOHN E. KEELER, [SEAL.]
Notary Public.

5 EXHIBIT "A."

John D. Long, Secretary.

W. A. M.
244564.

NAVY DEPARTMENT,
WASHINGTON, *Dec.* 8, 1900.

SIR: On December 11th, 1900, you will regard yourself transferred to the retired list of officers of the U. S. Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11, of the naval personnel act, approved March 3rd, 1899.

Respectfully, JOHN D. LONG, *Secretary.*

Captain John Lowe, U. S. N., Pope tube works, Hartford, Conn.

6 EXHIBIT "B."

No. 1489.—A. L. G.

TREASURY DEPARTMENT,
OFFICE OF AUDITOR FOR THE NAVY DEPARTMENT,
WASHINGTON, *January 30th*, 1901.

In reply to this letter the above number must be referred to.

John Lowe, rear-admiral U. S. Navy, retired, Lowecroft, Noroton, Conn.

SIR: Your claim for difference of pay from December 11, 1900, to date, has been disallowed for the following reasons:

You were retired on Dec. 11, 1900, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank

and three-fourths of the sea pay of the next higher grade, that is rear-admiral, in accordance with section 11 of the naval personnel act of March 3, 1899. You are entitled to and have received, three-fourths of the sea-pay as a rear-admiral, being the pay of a brigadier general of the army, in accordance with section 7 of the naval personnel act.

An officer of the navy with the rank of captain, retired under the provisions of section 11 of the naval personnel act of March 3rd, 1899, which provides, that an officer with a creditable record and who has served in the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade, is entitled, on retirement after March 3, 1899; to three-fourths the
7 sea pay of a rear-admiral of the nine lower numbers, or three-fourths the pay, then received by a brigadier general of the army. (5 Comptroller's Decisions, 750.)

Respectfully, JOHN M. ELLING,
Acting Auditor.

8 Appeal No. 6328. May—5c.

(EXHIBIT "C.")

Pay of a Captain in the Navy Retired in the Next Higher Grade.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
August 22, 1901.

John Lowe, rear-admiral, U. S. Navy (retired), appealed, June 29, 1901, from the action of the Auditor for the Navy Department in settlement claim No. 1489, dated Jan. 25, 1901, disallowing his claim for difference of pay, as a retired officer.

Said officer at the date of the navy personnel act of March 3, 1899, was a chief engineer with the relative rank of captain. Under the provisions of that act he took rank as a captain in the navy from March 3, 1899. On Dec. 11, 1900, he was placed on the retired list in accordance with section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.* rear-admiral, in accordance with the provisions of section 11 of the navy personnel act. Since his retirement he has been receiving the retired pay of a brigadier general of the army, being three-fourths the sea pay provided by law for a rear-admiral of the nine lower numbers.

He made a claim for the difference between the pay so received and the retired pay of a major general of the army, contending that there is only one grade of rear-admiral and that the rate of pay provided for rear-admirals of the nine lower numbers does not apply to officers on the retired list. The auditor disallowed this claim as above stated.

9 In decision of April 29, 1899 (5 Comp. Dec., 750), it was held—

"That by section 7 of said act there was constituted, for pay pur-

poses, two grades of pay for officers in the grade of rear-admiral * * * and that a staff officer with the rank of captain on the active list should be retired under said section upon three-fourths the sea pay of a rear-admiral embraced in the nine lower numbers, or three-fourths the pay of a brigadier general."

On the authority of that decision the action of the auditor disallowing his claim is affirmed.

R. J. TRACEWELL,
Comptroller.

10 II.—*Amendment to Petition. Filed November* 4, 1902.

Comes now the claimant, above named, by his attorney, and with leave of the court in that behalf first had and obtained, amends the petition by him heretofore filed herein, by increasing the amount for which it is there prayed that judgment may be entered for said claimant from $1,125 to $2,750, the latter amount being the difference in pay withheld from claimant without right, as in said petition set forth, from the date of his retirement, December 11, 1900, to October 11, 1902.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

III.—*Amendment to Petition. Filed January* 12, 1903.

VII.

Claimant further shows, that the difference in pay, so withheld from him without right, as aforesaid, amounts to the sum of $1,500, and, at this time, to the sum of $3,125; that, as above shown, he is justly entitled to recover said sum from the defendant, after allowing all just credits and set-offs; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him; and that he has at all times borne true allegiance to the United States.

Wherefore, claimant prays judgment herein in his favor against the defendant, in the sum of $3,125.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

A. A. HOEHLING, JR.,
Of Counsel.

11 IV.—*Traverse. Filed January* 12, 1903.

JOHN LOWE
vs.
THE UNITED STATES. } No. 22626. Term 1902–1903.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.
W.

12 V.—*Findings of Fact and Conclusion of Law. Filed February 2, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, make the following findings of fact:

I.

The claimant, John Lowe, then a captain in the United States Navy, with a creditable record, and who had served during the Civil War, was retired by the following order:

"NAVY DEPARTMENT,
"WASHINGTON, *December* 8, 1900.

"SIR: On December 11, 1900, you will regard yourself transferred to the retired list of officers of the United States Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11 of the navy personnel act, approved March 3, 1899.

"Respectfully, JOHN D. LONG, *Secretary.*

"Capt. John Lowe, U. S. Navy, Pope Tube Company, Hartford, Conn."

II.

Since his said retirement, claimant has received pay at the rate of $4,125 a year, being three-fourths of $5,500, the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier general in the army.

III.

If paid at the rate fixed by section 1261 for a major general in the army, he would receive pay at the rate of three-fourths of $7,500 a year, being $5,625 a year, a difference of $1,500 a year over and above what he has been and still is receiving, as above stated, amounting to the sum of $3,125.00.

Conclusions of Law.

Upon the foregoing findings of fact, the court decides as a conclusion of law that the petition be dismissed.

13 VI.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court.

The court has considered, in connection with this case, the case of Gibson, No. 22864. The claimant, a captain in the navy, with a creditable record, and who had served during the Civil War, was retired on the following order:

"NAVY DEPARTMENT,
"WASHINGTON, *December* 8, 1900.

"SIR: On December 11, 1900, you will regard yourself transferred to the retired list of officers of the United States Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11 of the navy personnel act, approved March 3, 1899.

"Respectfully, JOHN D. LONG, *Secretary.*

"Capt. John Lowe, U. S. Navy, Pope Tube Company, Hartford, Conn."

Since such retirement the claimant has received pay at the rate of $4,125, being three-fourths of $5,500, the pay fixed by section 1261, of the Revised Statutes as the pay of a brigadier general in the army. If paid at the rate of a major general in the army, he would have received pay at the rate of three-fourths of $7,500 a year, being $5,625 a year, a difference of $1,500, a year above what he has been receiving as above stated.

This suit was brought to recover the difference between the pay of a brigadier general in the army and that of a major general.

Section 1444, Revised Statutes, is as follows: "When an officer below the rank of a vice-admiral is 62 years old he shall, except in the case provided in the next section, be retired from the active service."

Section 11 of the navy personnel act is as follows: "That any officer of the navy with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths sea pay of the next higher grade." (30 Stat. L., 1007.)

Section 13 of the naval personnel act (30 Stat. L., p. 1007) provides as follows:

"That after June 30, 1899, commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army."

The first proviso in section 7 of the naval personnel act (30 Stat. L., p. 1005) is as follows:

"That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the army."

It is insisted by claimant that being a rear-admiral on the retired

list he ranks with a major general in the army, and therefore entitled to the same pay.

14 The question is therefore presented as to whether a captain in the navy when retired as a rear-admiral, under the provisions of section 1444, Revised Statutes, and section 11 of the naval personnel act, shall receive the pay of a major general or that of a brigadier general.

It is contended by the defendants, that when the claimant was promoted to the next higher grade, to wit, rear-admiral, that he became in legal effect a part of the nine lower number- of the eighteen rear-admirals provided for by the provisions of section 7, as quoted above.

The contention is, therefore, to be determined by the decision of the question as to which class he legally belongs. If by operation of his retirement he passes into and becomes a part of the higher number, his contention as to the pay of a major general is well founded; but if in legal effect he became a part of the lower number, he is entitled to the pay of a brigadier general, and is therefore not entitled to recover in this proceeding, having been paid at that rate.

It is said by the Comptroller of the Treasury (vol. 7, p. 164), "The naval personnel act abolished the grade of commodore and practically substituted a new grade for pay purposes within the grade of rear-admiral, known as the nine lower numbers of that grade, and into this subgrade commodores were advanced."

This presents the real issue in this proceeding, and if that construction be correct, then the claimant has been paid all he is entitled to, and is therefore not entitled to recover.

It is insisted by counsel for claimant in the Gibson case—a like case, that the fact that sections 8, and 9, of the personnel act retained for purposes of pay certain officers of the rank of commodore, which corresponds to that of brigadier, without any express provision of retirement in the next higher grade above that of captain, is an indication of a legislative intent to place the claimant, retired under section 11, of said act, in the rank or grade of a rear-admiral having pay of the higher number; that without qualification the retirement of the claimant was to the full pay of a rear-admiral without diminution incident to the numbers in the list of admirals.

In support of the theory of the plaintiff's right to recover, our attention has been cited, in the case of Gibson, argued in connection with this case, to the decision of the Supreme Court in the case of *Rodgers v. The United States* (185 U. S., p. 83), affirming the decision of this court in 33 C. Cls. R., p. 266, in which the Supreme Court says:

"Prior to the act of March 3, 1899, the corresponding ranks of officers of the navy and the army were rear-admiral and major general, commodore and brigadier general, captain and colonel. By that act the rank of commodore was abolished, although that of brigadier general was undisturbed. No change was made in the relative rank of captain and colonel, or of rear-admiral and major

general, but the legislation left one rank in the army to which there was no corresponding rank in the navy. The statute in effect lifted the rank in the navy which was corresponding to that of brigadier general in the army to that of rear-admiral, and corresponding with that of major general in the army."

It is contended that this definition of the relative rank between the officers of the army and navy tends to strengthen the claims of the plaintiff.

The decision settles the rank of the claimant, but that does not settle the question in issue in the case.

It is said in that connection, that there is no exception in the terms of the law which justifies the claimant being placed on the lower basis of pay, but in reply to that it may be said that there is no provision of the law placing him on the higher basis, the pay of an admiral.

The statute has made a distinction in pay of the admirals on the active list by a classification by numbers, and upon that classification has based the emoluments of the rank, and when the claimant is placed in the rank, he confronts two conditions, which may from the pay be called the higher and lower number.

It is ably argued by the counsel in the case of Gibson, No. 22864, and in this case, that there is no room for construction of the act upon which the claimants' right is based; that the words of the law are plain and unambiguous, and therefore it is the duty of the court to enforce the statute by the application of its terms and language. Many authorities are cited to sustain the theory, that where the words are plain and unambiguous there is no room for construction or interpretation; and therefore the simple duty of the court is to apply the law as by its terms it has been enacted by the legislature. It is said in substance that section 11 does not provide that a captain who has served during the Civil War upon retiring with the rank of a rear-admiral shall receive less than the rank of a rear-admiral, and that the classification of higher or lower numbers is intended for the active list of the navy, and has no application to the claimant, he being on the retired list; that if it had been the intention of Congress that the claimant was to receive the pay of a brigadier general, it would have been so provided in the statute, and that in the absence of any such provision the statute must be interpreted, not from conditions existing in the retired list, but from the words of the law. In support of the theory that where the real meaning of the statute is plain and there is no room for ambiguity, it is the duty of the court to enforce it according to its very language.

Our attention has been cited to the cases of *Lake County v. The United States* (130 U. S., 662, 663); *United States v. Tyler* (105 U. S., 244); *Thornley v. The United States* (173 U. S., 310); *Queen v. Poor Law Commission* (6 Adolph and Ellis, 66); *County Seat of Linn County* (15 Kansas, 501), and other cases, establishing the well-settled doctrine that statutes are to be applied and not construed when no doubt arises from the words and provisions of the law. We have carefully examined the cases relied on by counsel in both cases; but do not find that they settle the controversy arising upon

the words and terms of the various statutes in relation to the subject-matter of this proceeding, as contended by claimants.

In the construction of the thirteenth section of the personnel act, and the section of said act which makes a distinction in the pay of rear-admirals dependent upon their grade in numbers, we are dealing with a condition arising from the proviso making such distinctions, and must deal with that condition in the most reasonable way in determining the will of the legislature. The two sections taken together require construction and interpretation, and we are not confined to the application of the mere words of the statute. Where the words are plain and unambiguous the duty of the court is to apply the plain words of the statute; but when the subject-matter of the law is somewhat variable, then it is the duty of the court to so interpret or apply the words of the law as is most reasonable and
16 just to such conditions, and thereby effectuate the intent of the legislature. Upon the transfer of the claimant to the retired list of the navy, by operation of law he succeeded to the next highest rank as a rear-admiral it is true, but in that rank we find a classification as to pay; that classification has a higher and lower grade of pay, one-half receiving the sum of $7,500 and the other half the sum of $5,500. The question in this case is not a question of rank but of pay, and the next highest pay to a captain (the rank of commodore being abolished by the personnel act) is that of an admiral in the lower number of the list of admirals.

As has been said, this is a question of pay and not of rank in the active list of the navy, and we find a classification of admirals as to pay, the higher numbers receiving the larger pay and the lower numbers the smaller pay. The intent of the personnel act as shown by the words of the statute was to promote the claimant to the corresponding rank in the army, but the rank in the navy corresponding to the rank in the army has two grades of pay, depending on the number which is held by the respective officers, thereby establishing a variety in the condition of pay. Promotion unless otherwise ordered is by regular gradation, and each step is presumed to be taken unless otherwise provided. Applying that rule to the case of the claimant, his first step being promotion of pay would be into that grade having a lower rate of pay, and not into the grade having the right of higher pay.

The main object of the act of March 3, 1899, in dealing with the rights of the claimant was promotion for the purpose of pay, and not of rank; and the qualifications on that promotion "with rank and three-fourths sea pay of the next higher grade, *i. e.*, rear-admiral," as stated in the order, following the substance of the statute, must mean the pay of a brigadier general, that pay corresponding with the pay of the nine lower numbers on the active list.

Pay and not rank being the paramount purpose of the law, we must regard the grades of pay which we find incident to the active list of the navy, and at the threshold of those grades looking at and for the "next higher" we find as the lowest grade of pay the pay of a brigadier general, and keeping in view the idea of it being a

question of pay, we must adopt as the "next higher" the lower grade of pay.

In support of this theory of the law the case of Rodgers, *supra*, may be cited, in which it is said in the opinion of the Court of Claims (36 C. Cls., R., 275): "That for the purpose of pay a distinction is created by the act (R. S., sec. 1366) in the grade of rear-admiral and special provision therefor."

In affirmation of the decision of this court the Supreme Court says: "The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear-admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who, by length of service or by personal distinction, had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the army should not, by a mere change of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the army? May not this explain its action in so dividing the rear-admirals into two classes—one composed substantially of former rear-admirals, equal both in rank and pay with major generals in the army, and the other of those who in the past were only commodores, to whom was given the rank of rear-admirals but the pay of brigadier generals in the army?"

It is the conclusion of the court that the claimant, for the purpose of pay, falls within the lower numbers of the rear-admirals having the pay of a brigadier general in the army and having been paid at that rate, the petition is therefore dismissed.

17 VII.—*Judgment of the Court.*

JOHN LOWE
vs.
UNITED STATES. } No. 22626.

At a court held in the city of Washington on the second day of February 1903 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant John Lowe be dismissed.

BY THE COURT.

18 VIII.—*Application for and Allowance of Appeal.*

JOHN LOWE
v.
UNITED STATES. } No. 22626.

Comes now John Lowe, the above-named claimant, by his attorney of record, and prays an appeal to the Supreme Court of the United States, from the final judgment of this court dismissing his petition, as amended herein.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

Filed February 2, 1903.

Ordered. That the appeal as prayed for be allowed.

BY THE COURT.

February 2, 1903.

19 Court of Claims.

JOHN LOWE
vs.
UNITED STATES. } No. 22626.

I John Randolph assistant clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 5th day of February A. D. 1903.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,828. Court of Claims. Term No. 600. John Lowe, appellant, *vs.* The United States. Filed February 9th, 1903.